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WILL ACQUIESCENCE VALIDATE AN IRREGULARLY ADOPTED STATE CONSTITUTIONAL AMENDMENT? — It has almost universally been held by state courts that the validity of the adoption of a constitutional amendment is a judicial question.[1] Of the expediency of a proposed change the final determination rests with those bodies to whom the constitution in question has delegated the amending power.[2] Under the typical state constitution, the valid exercise of this power requires the concurrence of two conditions: (1) the expression of assent to the amendment by the prescribed proportions of the legislature and electorate; and (2) that this expression be accomplished by a prescribed procedure involving certain ministerial acts. Whether or not these latter requirements are met in a given case is in its nature a judicial question.[3]

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[1] McConaughy *v.* Secretary of State, 106 Minn. 392, 119 N. W. 408 (1909); State *v.* Powell, 77 Miss. 543, 27 So. 927 (1900); Rice *v.* Palmer, 78 Ark. 432, 96 S. W. 396 (1906); Bott *v.* Secretary of State, 63 N. J. L. 289, 43 Atl. 744 (1899); Ellingham *v.* Dye, 178 Ind. 336, 99 N. E. 1 (1912).

[2] See COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 62, 63; Varney *v.* Justice, 86 Ky. 596, 6 S. W. 457 (1888); Mulnix *v.* Mutual Benefit Life Ins. Co., 23 Colo. 71, 46 Pac. 123 (1896).

[3] But whether or not a constitution has been properly adopted has usually been considered a political question. A court holding office under the old constitution might not be legally *in esse* if the new one were valid and hence would be incapable of decid-

Therefore, on the accepted theory that constitutional provisions are mandatory,[4] state courts have frequently held that amendments never became part of the constitution in cases where some one of the procedural details required by the amending clause had been omitted.[5] There is a body of authority, however, which considers such provisions directory rather than mandatory, so that substantial compliance therewith is deemed sufficient to validate the amendment.[6] It is true that the usual state constitution of to-day is a lengthy document replete with detailed provisions, but it would seem a dangerous rule to allow any words in it to be interpreted in such fashion as to make them nugatory. A constitution is the fundamental law adopted by the people for their government and none of its contents can be considered mere surplusage.[7] The requirements of the amending clause are the greatest safeguards against hasty and ill-advised tampering with a constitution. Yet courts which take the second view insist that "substance of right is grander and more potent than method of form," [8] and then declare that the procedural provisions are only matters of form. An examination of these cases will show that in the majority the courts need not have laid down so broad a rule, as they are supportable on the theory that an ambiguous constitutional provision may be reasonably construed.[9]

But where an irregularly adopted amendment has been acquiesced in by the various departments of the state government and by the people over a period of time, the courts may well feel loath to disturb rights which have become vested before the validity of the amendment is questioned. Logically it would seem that no distinction could be

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ing the problem judicially. See Miller *v.* Johnson, 92 Ky. 589, 18 S. W. 522 (1892); Brickhouse *v.* Brooks, 165 Fed. 534 (E. D. Va., 1908); McConaughy *v.* Secretary of State, *supra*. And see Luther *v.* Borden, 7 How. (U. S.) 1 (1849).

Whether or not a federal court may declare a state constitutional amendment invalid for some non-compliance with the requirements of the state constitution is disputed. See Smith *v.* Good, 34 Fed. 204 (D. R. I., 1888); Knight *v.* Shelton, 134 Fed. 423 (E. D. Ark. W. D., 1905).

[4] See COOLEY, *op. cit.*, 114.

[5] Johnson *v.* Craft, 205 Ala. 386, 87 So. 375 (1921); Koehler *v.* Hill, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609 (1883); McBee *v.* Brady, 15 Idaho, 761, 100 Pac. 97 (1909); State *v.* Tufly, 19 Nev. 391, 12 Pac. 835 (1887). See Opinion of the Justices, 6 Cush. (Mass.) 573 (1833); 5 MINN. L. REV. 551. This result is necessarily reached in Montana, where the constitution expressly states that all its provisions are mandatory. State *v.* Tooker, 15 Mont. 8, 37 Pac. 840 (1894); Durfee *v.* Harper, 22 Mont. 354, 56 Pac. 582 (1899).

[6] Prohibitory Amendment Cases, 24 Kan. 700 (1881); West *v.* State, 50 Fla. 154, 39 So. 412 (1905); State *v.* Winnett, 78 Neb. 379, 110 N. W. 1113 (1907); Oakland Paving Co. *v.* Tompkins, 72 Cal. 5, 12 Pac. 801 (1887); State *v.* Herried, 10 S. D. 109, 72 N. W. 93 (1897).

[7] COOLEY, *op. cit.*, 114.

[8] Brewer, J., in Prohibitory Amendment Cases, *supra*, at 710. The court went on to say that the only essential features of the amending process are the assent of the required proportion of the legislature and popular approval.

[9] Failure to enter the amendment in full on the House and Senate journals is the most frequent cause for attack on the validity of amendments. Where the constitution merely requires that the amendment be entered on the journals, without using the words "in full," many courts have construed an entering by title or identifying reference to be a sufficient compliance with the constitutional mandate. Prohibitory Amendment Cases, *supra*; Oakland Paving Co. *v.* Tompkins, *supra*; State *v.* Herried,

drawn between an allegedly void amendment immediately attacked and one whose validity is not challenged for many years. If it did not become a part of the constitution originally, how can the passing of time give it life? There is no presumption[10] of validity from mere acquiescence.[11] Yet there are a few instances where such amendments have been held valid after long executive, legislative, and popular recognition.[12] The language of some of the courts tends to give the impression that the constitutional requirement which was not complied with was considered merely directory.[13] But it will be noted that in each case the amendment attacked was one which made essential changes in the structure of the government and whose overthrow would so disrupt the functions of the state and destroy vital individual interests secured in reliance upon it that a situation approaching partial anarchy would be created.[14] In such a case the long acquiesence has had the effect of weaving the amendment almost indissolubly into the political fabric. A situation has arisen where the political aspect of the case has become so prominent as to override the possible result of a judicial inquiry.[15] Rather than disintegrate the political and social system of the state, courts

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supra; *Ex parte* Ming, 42 Nev. 472, 181 Pac. 319 (1919); *In re* Senate File 31, 25 Neb. 864, 41 N. W. 981 (1889). Where the words are susceptible of two reasonable meanings, courts will construe them in favor of that meaning which will validate the amend ment. See Hammond *v.* Clark, 136 Ga. 313, 71 S. E. 479 (1911).

[10] It is true that acquiescence by the legislature in the exercise of one of its powers by the executive may raise a presumption that the executive act is valid. United States *v.* Midwest Oil Co., 236 U. S. 459 (1915). In such a case the legislative assent does not create a new power in the executive but merely ratifies an act done by him. See 28 HARV. L. REV. 613. But in the case of a constitutional amendment the legislative power is usually non-delegable. As regards statutes, see COOLEY, *op. cit.*, 106, and cases cited.

[11] An interesting *dictum* as to the possibility of amending the Federal Constitution by acquiescence occurs in the recent case of Leser *v.* Garnett, 114 Atl. 840 (Md. 1921). The plaintiff attempted to show that the 19th Amendment was beyond the amending power. He sought to distinguish the 15th Amendment on the ground that acquiescence in it for fifty-one years was equivalent to express ratification by the states. In dismissing this contention, the court said (p. 846): "We cannot, in the face of the direct language of the Constitution describing the manner in which it may be amended, recognize the doctrine of amendment by acquiescence as a valid substitute for that method."

[12] Nesbit *v.* People, 19 Colo. 441, 36 Pac. 221 (1894); Weston *v.* Ryan, 70 Neb. 211, 97 N. W. 347 (1903); Secombe *v.* Kittelson, 29 Minn. 555, 12 N. W. 519 (1882).

[13] See Nesbit *v.* People, *supra*.

[14] In Nesbit *v.* People, *supra*, the amendment attacked provided that the biennial legislative sessions should be lengthened from forty to ninety days. Five successive legislatures over a period of nine years had sat for ninety days, and it was proved that 95 per cent of the legislation enacted at each session was passed during the last fifty days of the session. The court declined to rule that the amendment was invalid, stating that to do so would not only "affect rights and interests . . . in a degree wholly irreparable, but would disorganize the different departments of government . . . to such a degree as to almost produce a state of anarchy."

[15] See DODD, REVISION AND AMENDMENT OF STATE CONSTITUTIONS, 222–225. See also Secombe *v.* Kittelson, *supra*, note 11, and Smith *v.* Good, *supra*, note 3, in which cases there is language which suggests that the courts considered the validity of an amendment as well as of a constitution a political question. In this connection the word "political" indicates a situation in which the courts will not question the acts of the legislature or executive for reasons of policy or expediency.

will inevitably decline to interfere, permitting the governmental and popular recognition [16] of the amendment to control.[17]

These cases, however, must be deemed exceptional and not to be followed as general authorities. In a recent case in Alabama,[18] in which no such fatal consequences would have ensued from a refusal to sustain the amendment, the Supreme Court of that state was clearly right in declining to pronounce valid an irregularly adopted amendment, although that court itself had previously decided a case [19] under the amendment in question and it had been recognized by the political departments of the state. When constitutional provisions are unambiguous, courts ought not to yield to considerations of expediency in expounding them,[20] unless the situation has got beyond their control.

EFFECT OF SECOND MORTGAGE ON THE RIGHTS OF A PARTY SUBROGATED TO THE SECURITY OF THE FIRST MORTGAGEE. — To secure a debt, D, holding an unincumbered fee in Blackacre, executed a first mortgage upon it in favor of C, who had the mortgage duly recorded. In the jurisdiction, it gave C a legal lien on the property. D then misapplied money belonging to S in paying the debt, C receiving it without notice of the wrong. This payment was not recorded. Later, D executed a second mortgage on Blackacre to P, who paid value and had no knowledge of the mortgage to C. Having discovered the misapplication of his money, S seeks to come in ahead of P against the security, claiming subrogation to the rights of C under the first mortgage.[1]

Subrogation is an equitable doctrine.[2] It seeks to afford to a party

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[16] It might also be argued that these cases could be rested on the proposition that since the ultimate power rests in the people, they may amend their constitution in a manner other than that therein provided. That is to say, that it is possible for the people by acquiescing in an amendment to place it in the constitution despite the procedural omission of their agent, the legislature. Whether in a given case such power has been exercised would be for the court to determine. But in order to support this argument it must be conceded that the situation, though analogous to one of private agency, is sufficiently dissimilar, so that it is possible for the people thus to adopt the amendment without knowledge of the legislative omission. Moreover, the court cannot affirmatively deny the constitution under which it acts.

[17] As a corollary to the proposition that the proper adoption of a constitution is a political question (see note 3, *supra*), acquiescence by the departments of a state government in a new constitution establishes its validity. Taylor *v.* Commonwealth, 101 Va. 829, 44 S. E. 754 (1903); Brickhouse *v.* Brooks, *supra*.

[18] Hooper *v.* State, 89 So. 593 (Ala., 1921). For the facts of this case, see RECENT CASES, *infra*, p. 615.

[19] Cornelius *v.* Pruet, 204 Ala. 189, 85 So. 430 (1920).

[20] See Ellingham *v.* Dye, *supra*, note 1; COOLEY, *op. cit.*, 107n.

[1] McCullough *v.* Elliott, [1921] 3 W. W. Rep. 361. For the facts of this case, see RECENT CASES, *infra*, p. 624. The holding of the court in favor of S was probably influenced by the fact, appearing from language in the decision, that P took his lien only upon the interest which D actually had at the time, whatever that interest might be. Upon this view of the case the decision was clearly right.

In the principal case, D had applied S's money in only partial liquidation of C's mortgage before P's mortgage was taken. This does not affect the problems presented by the case, however, since S did not seek subrogation until after C's claim had been entirely satisfied.

[2] The theory of subrogation is that, though payment to the creditor extinguishes the primary obligation of the debtor to him at law, equity recreates it, *eo instante*, in